No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY,

Appellants,

vs.

MALLONEE, BUCKLIN and FERGUS, *i. e.,* THE SHAREHOLDERS' PROTECTIVE COMMITTEE of the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.,*

Appellees,

and consolidated cases

(Including)

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.,*

Appellees.

PETITION OF APPELLEES FOR REHEARING.
(The Shareholders' Protective Committee.)

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INTRODUCTION.

These appellees The Shareholders' Protective Committee of the Long Beach Federal Savings and Loan Association (Plaintiffs below) respectfully request that a rehearing be granted for the purpose of re-examining the appeal from a *"Preliminary Injunction With Findings"* which was made and entered by the U. S. District Court at Los Angeles on December 1, 1949 [R. 8194, etc.].

The only matter before this Honorable U. S. Court of Appeals for the Ninth Circuit on this Appeal No. 12511 was, and is, said "Preliminary Injunction With Findings" [See Notices of Appeal, R. 8557 and R. 8559].

I.
RESEIZURE—RUN.

Conscience of counsel will not permit him to fail to respectfully advise this Honorable Court that the holding of an Administrative Hearing may, and the "Reseizure" of the Long Beach Association probably would, in the opinion of counsel, cause a new run of withdrawals of deposits which might develop into a financial panic.

Counsel for these appellees respectfully declines to accept the responsibility of such a possible calamity.

II.
CLIMATE OF LITIGATION WHEN INSTITUTED (MAY, 1946).

Run of 1946: The summary seizure, whether justified or not, of the solvent Long Beach Federal Savings and Loan Association on May 20, 1946, by the defendants-appellants, *et al.,* set off a run of withdrawals which reached a peak of approximately $2,000,000.00 a day and was not completely halted until withdrawals of approximately $10,000,000.00 had reduced the savings deposits in the Long Beach Association from approximately $23,000,000.00 down to approximately $13,000,000.00. Since the restoration of said Association in January, 1948, the savings deposits have been rebuilt by its re-elected management from $13,000,000.00 (when conservator was removed) to now approximately $34,000,000.00.

Los Angeles Bank Merger (March 29, 1946): Less than 60 days before the commencement of this litigation by these appellees (The Shareholders' Protective Committee of the Long Beach Association) the also solvent Los Angeles Bank had been similarly seized and merged with the Portland Bank and the name changed to the San

Francisco Bank with head office at San Francisco. Both of the said financial institutions at the times of their respective seizures were solvent with ample surplus of undivided profits (Long Beach Association had approximately $1,300,000.00 surplus and reserves) and none of them were in danger of, or threatened with insolvency. The Association and the Los Angeles Bank, whose surplus was approximately $1,900,000.00, were both healthy, fast growing, sound, financial institutions.

This is the climate in which the original complaint was drafted May 23 to 27, 1946, when it was filed.

III.
SHAREHOLDERS' OBJECTIVES IN LITIGATING.

1. To Stop Run.

The Long Beach Association would be completely destroyed by the mounting run of withdrawals unless public confidence could be restored by prompt effective action. A lack of confidence of the savings public in the conservator was demonstrated by the run of withdrawals. The United States Courts generally enjoy the confidence of the public. The confidence of the savings public in the United States District Court at Los Angeles was demonstrated by the subsiding of the run following the entertaining of this litigation by the said United States District Court. The run of withdrawals slowed and finally ground to a halt in September, 1946, after the savings deposits had been reduced by more than 40%. Six of the ten millions withdrawn was in the six days prior to the filing of this action and only four million in the 100 days after the U. S. District Court accepted jurisdiction.

and none after the Three Judge Court announced its decision to restore local management. (68 Fed. Supp. 418.)

2. To Prevent Merger.

In May, 1946, in the opinion of counsel then and now, there was imminent danger of an immediate merger of the Long Beach Association with another association following the pattern of the previous merger of the Los Angeles Bank with the Portland Bank. To prevent such threatened merger a temporary restraining order was immediately obtained and, after hearing, this was followed by a preliminary injunction against merger which remained in force until after opposing counsel assured the United States Supreme Court that there would be no merger. After remand, said temporary injunction was dissolved.

3. To Regain Possession.

The shareholders of the Association desired to regain possession and control of the management and operation of their own savings institution. More than 50% of the shareholders of the Association signed authorizations for the maintenance of this litigation. This purpose was accomplished in part when said Association was restored following the Administration's adoption of Order 388 on January 17, 1948, rescinding the prior Order 5254 appointing a conservator. All shareholders unanimously reelected the former management at an election conducted by former opposing counsel U. S. Attorney, Ronald Walker, acting as Special Master supervising said election.

They have since twice unanimously re-elected substantially the same management in spite of this pending litigation and have further demonstrated their confidence in their duly elected management and in the United States Courts by redepositing their savings to the extent of approximately $34,000,000.00.

4. To Recapture Their Property.

A substantial portion (but not all) of the property seized has been recaptured and returned following Home Loan Bank Board Order 388 and judgment of the United States District Court at Los Angeles in January, 1948. The property returned is not the same as the property seized. First liens (trust deeds) insured by Federal Housing Administration or Veterans Administration or otherwise, were seized. Substantial amounts of the notes and trust deeds returned (approximately $5,000,000.00) are unseasoned "second" trust deeds of lower interest rates (4% and 4½% instead of 6% and 7%) and with longer maturities, some to 25 years. There is a substantial question as to whether or not such notes and "second" trust deeds negotiated by conservator Ammann are validly insured. Can the Federal Housing Administration or Veterans Administration insure second liens? Are second liens worth as much as first liens? Bonds have been substituted which have a lower market value. A substantial depletion of assets is still unexplained and unaccounted for. Whether or not there has been misappropriation of funds during the twenty months' conservatorship is still undetermined. Who actually received items aggregating approximately $160,000.00 is still unexplained. An accounting is necessary.

5. To Quiet Title.

The assets of these shareholder depositors were seized under color of authority and claim of title as conservator. This class action was necessary to remove incumbrances and clouds from the title to both the real and personal property of these appellees (the shareholder depositors whose money it is) and of their mutual thrift Association. The action sounded *in rem* and was brought under 28 U. S. C. 118, now Section 1665, the general quiet title section of U. S. Codes. The right to the control and management of one's own property, including one's own savings, is an incident of title. Interference with such right of control and management constitutes a cloud upon the title. The test of a cloud upon the title to property is the practical effect the claim, even though unfounded, has on the title or value or lessens the chance of a free sale. (*Carney v. Commonwealth Oil and Gas Co.*, 5 Fed. Supp. 304 (1933).)

Shareholders or stockholders may sue as a class to clear the cloud of wrongfully or unlawfully executed assignments, leases, transactions, deeds, etc., from their property. (*The Citizens Savings, etc., Co. v. Illinois Central Railroad Co.*, 205 U. S. 46, 51 L. Ed. 703, 27 S. Ct. 425.)

Ammann's transfers, assignments or conveyances of approximately $12,000,000.00 of the assets of these shareholders to the unlawfully created San Francisco Bank, whose very existence is disputed, were unlawful, wrongful, and a cloud upon the title of these shareholders and their mutually owned association, to their wrongfully conveyed assets.

These clouds upon title cannot be removed by an administrative tribunal. An administrative tribunal cannot

quiet the title of these shareholders (the actual owners) to these wrongfully conveyed assets.

The venue of the *in rem* action is where the property is located, *i. e.,* in California (*Thomas v. Emmett Irr. District,* 227 Fed. 560 (C. C. A. 9); *Commonwealth Trust Co. v. Reconstruction Finance Corp.,* 28 Fed. Supp. 586 (1939), including jurisdiction to clear title (*Jellenik v. Huron River Mining Co.,* 177 U. S. 1, 44 L. Ed. 647), and to issue temporary injunctions (*Harvey v. Harvey,* 290 Fed. 653).

There is a further now present practical phase to this subject of quiet title. Starting almost concurrently with the commencement of this litigation (June, 1946), the titles to the homes of more than 8,000 Southern California residents were clouded by defendant Ammann's unauthorized transferring, conveying, and assigning of notes and trust deeds amounting to approximately $12,000,000.00, frequently by rubber stamp endorsements, undated and unsigned. This made necessary numerous interpleader and intervention proceedings to clear the titles to homes of borrowers who desired to pay off their loans. The first interpleader was in June, 1946, when the Home Investment Company deposited approximately $800,000.00 in the registry of the court to pay off and clear the titles to 174 homes. During 1946 and 1947 there were more than fifty interpleader proceedings necessary to clear the titles to some 400 homes. The titles to such homes have been cleared and quieted in collateral interpleader and intervention proceedings by the United States District Court within whose territorial jurisdiction such real property is located.

Is the Home Investment Company to be given back its $800,000.00 out of the Registry of the United States

District Court at Los Angeles and the titles to the homes represented by said 174 trust deeds and notes, to be reclouded?

Many of these homes have been resold in reliance upon the integrity of the Federal Court's final judgment in these interpleader matters.

6. To Obtain an Accounting.

One of the original purposes of the shareholders was to obtain an accounting of their savings seized by the defendant Ammann. This has not yet been accomplished, although both the Administration, by its Order 388 of January 23, 1948, rescinding Order No. 5254 appointing Ammann as conservator, and the United States District Court by its judgment of January 23, 1948, have concurred in affirming and approving this purpose of the shareholders [Par. III, R. 23].

The Administration's Restoration Order No. 388 (Note 18, p. 98, Opinion, 9 C. C. A.) and the Court's restoration judgment of January 23, 1948 [R. 8310] have never been changed, were not appealed or modified in any manner, and have now become final, as all parties agree, including appellants (App. Br. p. 35).

These shareholders are entitled to a "full and complete accounting" by defendant A. V. Ammann and his associates, irrespective of the validity or invalidity of his original appointment. The validity or invalidity of the appointment of the conservator cannot effect the requirement of his accounting as any trustee should account. Whether the take-over of May 20, 1946, was pursuant to a valid appointment or was an unlawful seizure, *i. e.,* a conversion, an accounting is necessary. The validity of Ammann's appointment may govern the degree of his ac-

countability, *i. e.,* whether he is accountable only for the exercise of reasonable care in the administration of the affairs of the Association, or whether he is to be held accountable as one who has unauthorizedly dealt with another's property, as in conversion, *i. e.,* liable for all losses and entitled to no credit for the gains.

However, under either view, Ammann should render a "full and complete account."

A full disclosure by the defendant Ammann of what properties were taken on May 20, 1946 (be it recalled that Ammann refused to give receipts for the assets taken, including uncounted cash), what was done with the properties taken, and what properties were given back, whether the same or substituted assets were returned and their values, are disclosures primarily necessary before any settlement or surcharging of the account of the defendant A. V. Ammann can be properly undertaken. One attempted accounting offered by the defendant Ammann was rejected by the United States District Court as "not a full and complete accounting" [R. 8992]. A supplement or second accounting has been tendered to which Objections have been filed by these shareholders and the Association.

(a) Charges Unitemized.

In the first accounting tendered by the defendant Ammann credit was claimed for approximately $160,000.00 for services claimed to have been rendered by Ammann to the Association to which objections were of course made as it was not itemized. [First Ammann Account—Examiners Adjustments, p. 39—Entry 43.] In the Supplemental Accounting it is claimed that supervisory examination assessments were $16,600.00 [page 103 of Supplement Accounting] yet at page 110 of said Supplemental Accounting three checks paid to the Federal Home Loan Bank are

listed totaling $79,547.25 in unexplained items. Whether the difference is funds misappropriated by the defendant A. V. Ammann or someone else is of course unknown until such accounting and the objections thereto have been heard and the matter settled. Such matters are now pending before the United States District Court's Special Master. Such inconsistencies are admittedly very confusing to us and probably are confusing to this Court.

This is only an example of some of the many inconsistencies of this voluminous so-called accounting, to which 140 pages of objections have been filed.

(b) Illegal Second Loans by Ammann.

Of greater importance, are approximately $5,000,000.00 of second trust deeds made by the defendant A. V. Ammann in renewed and renegotiated new loans. By placing two loans on the same property the aggregate of which exceeds the value of the property, the Federal Housing Administration or Veterans Administration Insurance was invalidated. It may be argued, that this is only a technicality. Nevertheless, the technicality of being a "second," instead of a first trust deed can well vitiate the Federal Housing Administration's or Veterans Administration's insurance of such loans on the grounds of misrepresentation to them by the conservator A. V. Ammann (this is irrespective of the validity or invalidity of his original appointment). A further question flows from this situation, *i.e.:* Is the Long Beach Association legally authorized to own such "second trust" deeds uninsured (if they are) by the Federal Housing Administration or the Veterans Administration.

The above six listed objectives are indicative, but not all inclusive, of the objectives of the shareholders in instituting this litigation.

IV.
COMPLAINT THEORIES.

The original complaint of these shareholders was properly described in its title to-wit: "For Return of Property, for Injunction for Declaratory Relief, and for Account" [R. 2].

The original complaint is not a model of perfect pleading. It was drafted under the compelling necessity of immediate court action to prevent a merger and destruction similar to the precedent *Los Angeles Bank* case. It was drafted in the climate of a run approaching a panic of withdrawals of deposits. It did proceed upon the theory that the unlawful seizure of the Long Beach Association "was a wilful, wanton, malicious and vindictive act" [R. 10]. * * * "In direct violation of and contrary to the Fifth Amendment of the Constitution of the United States of America" [R. 17].

The complaint thus set forth the two basic theories of:

1. Conversion of property with malice (fraudulent seizure).
2. Unconstitutionality of an enactment of Congress.

In November 1947, after argument of Motions to Dismiss, permission was granted by the United States District Court to amend the pleadings with the specific objective of spelling out with more particularity the fraudulent nature of the acts done, and tagging them with their true name and character; *i. e.*, fraud. This was done [R. 2961, First Amended and Supplemental Complaint, and R. 6798, Supplement to the First Amended and Supplemental Complaint].

V.

THREE-JUDGE STATUTORY CONSTITUTIONAL COURT VS. ADMINISTRATIVE HEARING.

Since the original complaint raised a question of constitutionality of an Act of Congress and sought injunctive relief to prevent irrevocable action thereunder pending decision (the merger of the Long Beach Association) the first question was: Which is the proper primary forum?

a. A THREE-JUDGE STATUTORY COURT, specifically created by Act of Congress for the primary purpose of determining the constitutionality of Acts of Congress where injunctive relief against their enforcement pending determination is also sought (28 U. S. C. 380a, now Secs. 2282 and 2284) which provides an expeditious direct appeal to the United States Supreme Court (now 28 U. S. C., Secs. 1253 and 2101); or

b. AN ADMINISTRATIVE HEARING before the same Administrative agency who was being accused of committing "a wilful, wanton, malicious vindictive act" under an unconstitutional statute. It is doubtful whether it could have been had as of right by the shareholders as neither the regulations nor statutes then afforded the shareholders any Administrative Hearing. To seek a non-existent Administrative remedy under the statute being attacked as unconstitutional might be claimed to be an estoppel.

That was the primary question then to be decided.

It is respectfully submitted that for the determination of the question of constitutionality of an Act of Congress, attacked as unconstitutional (Home Owners Loan Act of 1933 as amended, Sec. 5b) as distinguished from Administrative rules and regulations, the proper primary forum was, and is, the three-judge statutory court created by Act of Congress which is specifically charged with the responsibility of expeditiously determining such issues of constitutionality of statutes.

In *Jamerson & Co. v. Morgenthau,* 307 U. S. 170, 83 L. Ed. 1189 (1939), the United States Supreme Court declined to review "The Regulations and Administrative action thereunder," of the Secretary of the Treasury in denying the right to import "blended Scotch whisky" as improperly labeled. The Supreme Court held that direct appeals to it from judgments of Three Judge Statutory Courts are limited to "attacks upon an Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States."

Unconstitutionality of Rules, Regulations and Administrative Orders as such are not properly triable by a Three-Judge Statutory Court. (28 U. S. C., Sec. 380(a) now Sec. 2282; *Parker v. Tester,* 98 Fed. Supp. 300 (1951).)

The Three-Judge Statutory Court (Justices Orr, Ling and Hall) specifically refrained from, and did not, pass upon the Rules and Regulations (68 Fed. Supp. 418) nor were the Rules and Regulations before, nor passed upon by, the United States Supreme Court in *Mallonee v. Fahey,* 332 U. S. 245, 67 S. Ct. 1152, 91 L. Ed. 2030 (1947).

The primary question to be determined in this matter in May 1946 was the unconstitutionality or constitutionality of Section 5(d) of the Home Owners Loan Act as constituting an unlimited delegation of legislative authority to make regulations to deprive persons of property without due process of law and therefore repugnant to the United States Constitution generally and the Fifth Amendment in particular.

In the emergency of a $1,000,000.00 a day run approaching a panic and the fear of complete destruction by merger or dissolution similar to the Los Angeles Bank, these appellees (the shareholders) sought the most direct and expeditious manner of solving this litigation, *i. e.,* an injunction to restrain further action (merger) pending determination of the primary question as to unconstitutionality or constitutionality of Section 5(d) of the Home Owners Loan Act of 1933 as Amended.

The forum of the Three Judge Statutory Court specifically created by Act of Congress and charged with the primary responsibility of determining the constitutionality of Acts of Congress with immediate direct appeal to the United States Supreme Court, was deemed more expeditious and appropriate than the forum of the Administrative Tribunal whose constitutional authority was being attacked.

Even now the Long Beach Association who requested such an Administrative Hearing is being charged with estoppel thereby.

VI.

JURISDICTION AFFIRMED BY U. S. SUPREME COURT IN MALLONEE v. FAHEY (SUPRA).

The United States Supreme Court entertained and passed upon the constitutionality of Section 5(d) Home Owners Loan Act of 1933 as Amended.

It is significant that the United States Supreme Court in *Mallonee v. Fahey* took cognizance of the constitutional question and decided it. Had the United States Supreme Court considered there were other questions present upon which the matter could have been decided, it would have declined to pass on the constitutionality of Section 5(d) Home Owners Loan Act of 1933 as it did in cases such as *Alma Motor Company v. Timken Detroit Axle Co.*, 329 U. S. 129, 675 S. Ct. 231, 91 L. Ed. 129 (1947); *Aircraft Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947).

In *Mallonee v. Fahey* (332 U. S. 245), the United States Supreme Court definitely decided only two questions, although it discussed other possible issues.

It decided only that:

1. The Home Owners Loan Act of 1933, Section 5(d) was constitutional.
2. The United States District Court had jurisdiction.

The constitutionality of the act was upheld for two stated reasons, *i. e.*, (1) that it was a proper delegation of legislative authority (pp. 249-255) and (2) the plaintiffs were estopped (pp. 255 to 256).

The Supreme Court declined to decide other questions saying:

> ". . . There are other important and difficult questions raised in the case which it becomes unnecessary to decide." (P. 256.)

It reiterated at the end of the opinion:

> "We make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us." (P. 257.)

Jurisdiction in the United States District Court to hear and determine the question of Constitutionality of the Act, (Sec. 5(d) H. O. L. Act) was a necessary prerequisite foundation for the Appellate jurisdiction of the United States Supreme Court to entertain the appeal.

The United States Supreme Court was there exercising its appellate jurisdiction only. It is nowhere contended that the United States Supreme Court in *Mallonee v. Fahey* (*supra*) had, or was exercising, any original or primary jurisdiction. The United States Supreme Court so stated.

> "The case is here on direct appeal. 50 Stat. 752-753, 28 U. S. C. 349(a), 380(a), 28 U. S. C. A. 349(a)" (now 28 U. S. C. 1252, 1253, 2101, 2282 and 2284.)

If the United States District Court had lacked jurisdiction, the United States Supreme Court would have lacked appellate jurisdiction itself, and would have had no alternative, except to order dismissal of the entire action, leaving undecided the question of the constitutionality of Section 5(d) of the Home Owners Loan Act.

The United States Supreme Court evidently was satisfied that the United States District Court had jurisdiction, and it therefore entertained the appeal and decided the constitutionality of the Act involved.

The jurisdiction of the United States District Court was affirmed by the United States Supreme Court in *Mallonee v. Fahey* (*supra*).

VII.

JURISDICTION ONCE ACQUIRED IS NOT REVOKED BY REVERSAL OF THE DECISION OF UNCONSTITUTIONALITY.

> "Because of the federal question raised by the bill of complaint, the District Court (composed of three judges convened under 28 U. S. C. A. 380) had jurisdiction to determine all the questions in the case, local as well as federal." (Citing cases.) (Insert added.)

Railroad Comm. of California v. Pacific Gas & Electric Co. (1937), 302 U. S. 388, 82 L. Ed. 321, was "an appeal from a final decree of the District Court, composed of three judges (28 U. S. C. A. 380) permanently enjoining an order of the Railroad Commission of the State of California" as depriving the company of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The United States Supreme Court upheld the constitutionality of the procedure of Section 32 of the California Public Utilities Act (1923 Stat. 837 of Cal.), and *although reversing on the constitutional question* stated further:

> "The main issue in this litigation is whether the rates as fixed by the Commission's Order are confiscatory. The District Court did not determine that issue. The District Court should determine it. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion."

In *Railroad Comm. of Cal. v. Pacific Gas & Electric Co.* (*supra*), the jurisdiction of the Federal District Court having been once acquired continued, although it rested solely and exclusively upon the Federal question of un-

constitutionality of the California Public Utilities Act, which was determined with finality by the United States Supreme Court holding it constitutional. The sole Federal question was thereby removed from that litigation. There was no diversity of citizenship, other Federal questions, nor Federal "sue and be sued" corporations whose stock was more than 50% owned by the United States (28 U. S. C. 1349).

Whereas in *Mallonee, et al.* (of California), *v. Fahey* (of Massachusetts), Ammann (of Maryland), and San Francisco Bank (whose stock was 60% owned by the United States until about 1949) there is a multiplicity of Federal questions remaining. Some Federal Enactments, the validity and construction of which are in question are listed on page 6 of this Appellee's (Shareholders) brief in Appeal 12511.

The jurisdiction of the United States District Court, upon which *Mallonee v. Fahey* (*supra*) rests, continues until the remaining issues are finally determined.

In *Silver v. Louisville Nashville R. R. Co.* (1909), 213 U. S. 176 at 191, 54 L. Ed. 757, 29 S. Ct. 451, the United States Supreme Court says:

> "The appellants deny the jurisdiction of the Circuit Court in this case. There is no diverse citizenship in the case of this particular company and the jurisdiction must depend upon the presence of a Federal question."

Although declining to decide the Federal constitutional question the court briefly states the rule to be:

> "The Federal questions as to the invalidity of the State statute because, as alleged, it was in violation

of the Federal Constitution, gave the Circuit Court jurisdiction, and having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or State questions only.

"This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit." (Citing cases.)

Also see:

Louisville N. R. Co. v. Garrett, 231 U. S. 298 at 303, 58 L. Ed. 229 at 238, 34 S. Ct. 48;

United Fuel & Gas Co. v. Railroad Comm., 278 U. S. 300 at 307, 73 L. Ed. 390 at 395, 49 S. Ct. 150.

VIII.

SUFFICIENCY OF THE ORIGINAL COMPLAINT WAS APPROVED BY MALLONEE v. FAHEY (SUPRA).

The United States Supreme Court recognized that the issue of the sufficiency of the original complaint was tendered for its decision. The court stated:

"Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action" (p. 248).

The United States Supreme Court, after specifically deciding the constitutionality of Section 5(d) Home Owners Loan Act, refused to direct dismissal of the complaint,

thus deciding, by necessary implication at least, that the complaint, even after the issue of constitutionality was decided, still stated a cause of action.

> "Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree, and mandate generally employed for that purpose . . . We are of the opinion that the mandate did not direct dismissal."
>
> *Rogers v. Hill,* 77 L. Ed. 1385 at 1389, 289 U. S. 582 (1933).

If the United States Supreme Court was of the opinion that the Complaint, with the constitutional question removed by decision, then "failed to state a cause of action" it should have, and no doubt would have, directed dismissal of the complaint, as it did in *Far East Conference v. U. S. No. 15* (March 10, 1952), and the other cases cited in this court's opinion at page 54.

It is significant that the Supreme Court in *Mallonee v. Fahey (supra)* in 1947 declined to order dismissal of the 1946 complaint "on the ground that it failed to state a cause of action" or on any other ground, but instead reversed "Without prejudice to any other administrative or judicial proceedings which may be warranted by law."

The sufficiency of the original complaint was approved in *Mallonee v. Fahey* (*supra*).

IX.

JUDICIAL PROCEDURE AUGMENTED BY ADMINISTRATIVE HEARING (IF NEEDED).

The United States Supreme Court in *Mallonee v. Fahey* (*supra*) having settled the constitutional question with finality, and being satisfied as to the jurisdiction of the United States District Court and the sufficiency of the complaint, it declined to dismiss. Instead, it recognized the complexity of the litigation, the many issues, the local and *in rem* in character, the danger of a multiplicity of actions, and the limitations of the administrative tribunal.

The United States Supreme Court recognized the inability of an administrative tribunal, (1) to solve all of the issues of the litigation, (2) to quiet title (especially to the California Realty) and (3) to enforce its decision against persons not subject to the control of the Home Loan Bank Administration such as the thousands of California Home Owners, whose money is in court, The Home Investment Company who has $800,000.00 in court, Mr. Wallis, who has a $50,000.00 check in court, The Title Service Co., a California Corporation, holder of title as trustee to thousands of California Homes, and many others, including the United States District Judge whose signature would be necessary on checks to withdraw the funds from the bank account of the court's registry.

In short the United States Supreme Court in *Mallonee v. Fahey* (*supra*) recognized that further administrative

or judicial proceedings or both might be necessary. It specifically left open the question of forum when it concluded its opinion saying:

> "and this without prejudice to any other administrative or judicial proceedings which may be warranted by law."

Possibly the United States Supreme Court hoped that the Administrative Agency and the United States District Court, each in its respective field, would proceed to solve this complex litigation.

No doubt the United States Supreme Court, in deciding *Mallonee v. Fahey* (*supra*), had in mind its own, then recent, decision in *El Dorado Oil Works v. U. S.* (1946), 328 U. S. 12; 66 S. Ct. 843; 90 L. Ed. 1053, in which it had opportunity to review and observe the successful operation of the procedure it had indicated in its prior decision in the same case of *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940), 308 U. S. 422-433, 84 L. Ed. 361.

There in 1940 the United States Supreme Court reversed and remanded saying:

> "when it appeared in the course of the litigation that an administrative problem committed to the commissioner was involved, the court should have stayed its hand pending the commissions determination of the lawfulness and reasonableness of the practice under the terms of the act. There should not be a dismissal but as in Mitchell Coal and Coke Co. v. Pennsylvania R. R. Co. (*supra*), *the cause should be held pending the conclusion of an appropriate administrative proceeding.*" (Emphasis added.)

The United States Supreme Court has repeatedly held in reversing cases, even specifically for failure to exhaust administrative remedies, that the cause should be "remanded so the case may be held pending the conclusion of appropriate administrative proceedings." (*Thomas v. Texas Mexican R. Co.* (1945), 328 U. S. 134 at 151; 90 L. Ed. 1132; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913), 230 U. S. 247 at 267; 33 S. Ct. 916; 57 L. Ed. 1472.)

Trans-Pacific Airlines v. Hawaiian Airlines, etc., 174 F. 2d 63 at 66 (1949—9 C. C. A.) in which this court stated,

> "The District Court of Hawaii therefore had no jurisdiction to proceed *but should have held the cause in abeyance until the Board made a primary determination, . . .*" (Emphasis added.)

The United States Supreme Court's procedure in *Mallonee v. Fahey* (*supra*) of reversing on the constitutional question alone, affirming jurisdiction, and remanding without dismissal, has been successful, at least in part, in solving some of this complex problem.

All injunctions were, of course, dissolved pursuant to the remand in the fall of 1947.

The United States District Court stayed its hand from interference with the administrative procedure until after the Administration issued its final Order 388 rescinding its prior Order 5254 appointing a conservator, and at the same time (January 17, 1948) directed that the Long Beach Association be restored and a "full and complete accounting" be filed by the conservator with the United States District Court in this action.

The administration further invited a court supervised election which was conducted by the Special Master, the former attorney for the administration. At this stage of the litigation there was far from interference by the court with the administrative process. The court's action was invited by the administrative board adopting its own resolution, removing the conservator, ordering an accounting, and requiring that a copy of that resolution be filed with the court, and that the accounting be filed with the court. Protection of this Judgment of January 23, 1948, effectuating the Board's Order 388 was the primary objective of the appealed injunction.

X.
AN APPELLATE COURT WILL NOT DECIDE QUESTIONS NOT BEFORE IT.

It is presumed that this United States Court of Appeals, in the instant opinion, intended to decide only such questions as were necessary for its decision of this Appeal from a Preliminary Injunction.

The decision of the merits, on an appeal from a Preliminary Injunction, is not proper. (*Deckert v. Independent Shares Corp.* (1940), 311 U. S. 282; 85 L. Ed. 189; *Rogers v. Hill* (1933), 289 U. S. 582; 77 L. Ed. 1385; *Pendergast v. N. Y. Telephone Co.* (1923), 262 U. S. 43; 67 L. Ed. 853.)

The reversal of a Preliminary Injunction unless with a mandate to dismiss. . . .

> "would not prevent the District Court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings,

vary or expand the issues, and take other proceedings to enforce the accounting sought by his bills of complaint."

Rogers v. Hill (*supra*) which reversed the C. C. A. for affirming a dismissal which the District Court had entered pursuant to language in a prior opinion reversing a Preliminary Injunction.

XI.

SCOPE OF ADMINISTRATIVE HEARING HAS BEEN DEFINED BY JUDICIAL DECISION BRIGADED WITH ADMINISTRATIVE ACTION.

The United States Supreme Court decision in *Mallonee v. Fahey* (*supra*) and the administrative action taken by the Home Loan Bank Board in adopting Order 388 of January 17, 1948, are both final.

Order No. 388 was embodied in the appealable Judgment of January 23, 1948, which became final from lack of appeal [R. 8310]. The finality of Administration Order No. 388 "rescinding" [R. 8231] prior Order No. 5254 [R. 8229] appointing a conservator has been admitted by the appellants (App. Br. p. 35) and is not challenged by anyone.

The finality of the judgment of January 23, 1948, and Order 388 restoring the Long Beach Association to its Shareholder Owners has been relied upon and acted upon by all parties, by appellants who dismissed various appeals as "moot" (App. Br. p. 17), by thousands of borrower-homeowners, by shareholder depositors (old and new) to the extent of depositing over $34,000,000.00 of their savings, as well as by the public generally.

The finality of Order 388 and the Restoration Judgment of January, 1948, are irrevocably established.

If any future administrative hearings are to be held their scope has been defined by the decision in *Mallonee v. Fahey* (*supra*) and Final Administrative Order 388.

The conjunctive effect of *Mallonee v. Fahey* (*supra*) and Home Loan Bank Board Order 388 is to remove from consideration of an Administrative Hearing many questions which are now determined.

Among such issues which are now determined and not open for consideration by an Administrative Tribunal are:

1. That Section 5(d) of the Home Owners Loan Act, 1933 is constitutional;

2. That the Long Beach Association be restored to its shareholders and their elected management as has been done;

3. That a "full and complete accounting" is to be rendered the shareholders for the period of the conservatorship, and to be filed in Court for approval;

4. That the jurisdiction of the United States District Court over the *res* and subject matter is established and the interplead assets are to remain in the Registry of the United States District Court, until final determination after review;

5. That the titles to the homes of Southern California borrowers cleared by United States District Court Orders, now final, are not open for re-examination or inquiry.

XII.
QUESTIONS FOR ADMINISTRATIVE HEARING.

Unless the scope of an administrative hearing, if one is to be held, is delineated in some manner, such as herein suggested, its record, rulings, and determinations will be clouded with many questions and issues, beyond the orbit of its effective control, producing great confusion and hardship upon thousands of innocent persons.

Is an Administrative Hearing to examine, re-examine and determine such questions and issues as:

1. The constitutionality of the Home Owners Loan Act of 1933 or any of its subdivisions?

2. The validity of the interpleader proceedings whereby various Southern California property owners deposited money in the District Court's registry and received from its clerk deeds executed by Title Service Corp., a California Corp., whose claims for payment for services were transferred by court order from such properties to the funds in court?

3. Is the Home Investment Co. to receive back its $800,000.00 from the Registry of the United States District Court?

4. Is Attorney Robert H. Wallis to recover back the $50,000.00 cashier's check he interplead in the Registry of the United States District Court?

5. The "guilt or innocence" of Home Loan Bank Board Commissioner Kenneth G. Heisler (former Chief

Counsel) for drafting the seizure orders No. 5254 and participation in the fraudulent conspiracy to destroy a solvent financial institution, as charged?

6. The validity of the $5,000,000.00 of Ammann renegotiated, "Second" loans?

7. The validity of the Insurance of such "second" loans by the Veterans Administration or the Federal Housing Administration, upon the misrepresentations made by Ammann that they were first liens?

8. Will the decree or decision of the Administrative Hearing be enforceable against the Veterans Administration and the Federal Housing Administration to bind them upon their contracts insuring the approximate $5,000,000.00 of "second" loans made or renegotiated by the defendant A. V. Ammann?

9. Is the disputed termination of the hotel lease of Defendant Turner (a California citizen) who has interplead the rentals into the United States District Court, to be determined by the Administrative Hearing, whether Turner voluntarily intervenes or not?

10. Will the San Francisco, Portland and Los Angeles Banks be bound by the determination of an Administrative tribunal as to whether or not Ammann was validly appointed and duly authorized to sign the four notes for approximately $7,000,000.00 upon which suits were recently instituted in the Superior Court of California by the San Francisco Bank and by a Receiver for it?

11. Which of the three banks, Los Angeles, Portland, or San Francisco, is the present validly existing bank or banks, in which the Long Beach Association owns approximately $600,000.00 of stock?

12. Are the "contracts" of the Federal Savings and Loan Insurance Corporation which are represented to the public as insuring their savings deposits up to $10,000.00, enforceable by shareholder depositors in California to protect their savings or are their claims "barred by the statute of limitations" as plead by the defendant Federal Savings and Loan Insurance Corporation?

There are, of course, many other questions as to the scope and effect of an Administrative Hearing, if one is to be held.

XIII.
CLIMATE OF LITIGATION NOW—MAY, 1952.

The constitutionality of Section 5(d) of the Home Owners Loan Act of 1933 has been upheld by *Mallonee v. Fahey* (*supra*).

The conservator Ammann has been removed by Administrative Order 388 and judgment of Court entered January 23, 1948, and effectuated under the supervision of former U. S. Attorney Ronald Walker (former opposing counsel), acting as Special Master. All parties agreed to this.

Title to the homes of approximately 8,000 California residents have been cleared by judgments of Court now final.

The conservator, whether rightly or wrongly appointed, should render a "full and complete accounting" for the $26,000,000.00 of assets he dealt with during the twenty months of the conservatorship.

The right of these shareholders to such an accounting was recognized by the Home Loan Bank Board (Order 388), and "a full and complete accounting" was ordered

filed in this action (No. 5421, P. H.) An incomplete account was filed, found to be inadequate and a supplemental account has been filed to which objections have been filed, but which have not yet been determined.

The parties whose money is here involved are the shareholder depositors as a class. Their savings deposits now exceed $34,000,000.00.

In their interest, as well as others, the matter should be expeditiously postured for equitable determination on the merits.

XIV.
SOLUTION SUGGESTED.

It is respectfully suggested that a procedure for the expeditious determination on the equitable merits of this complex six-year-old litigation, is available.

This Court's opinion of April 2, 1952, points the way.

While we cannot agree that it was error to grant the preliminary injunction here appealed from, if this Honorable Court does ultimately reach the conclusion that the preliminary injunction should be dissolved, we respectfully suggest that the procedure indicated by the *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940) (*supra*), *El Dorado Oil Works v. United States* (1946) (*supra*), and *Trans-Pacific Airlines v. Hawaiian Airlines* (1949, 9 C. C. A.) (*supra*), cases be followed.

As stated in *Scripps-Howard Radio v. Fed. Comm. Com.* (1942), 316 U. S. 4, 86 L. Ed. 1229:

> "No court can make time stand still."
>
> "The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal despite anything a court can do. But within these limits it is reasonable that an appellate court

should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong."

Courts of review have inherent power to stay enforcement of administrative orders even during the pendency of an administrative hearing. (*Board of Governors of Federal Reserve v. Transamerica,* 184 F. 2d 311-326 (C. C. A. 9, 1950).)

Possibly that was the intention and meaning of the United States Supreme Court in *Mallonee v. Fahey* (*supra*), when it said:

"Nor do we mean to be understood that if supervisory authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

* * * * * * * *

". . . and this without prejudice *to any other administrative or judicial proceedings* which may be warranted by law."

It is suggested that if the preliminary injunction is to be dissolved that:

1. The scope of the administrative hearing, if one be held, be limited to matters, properties, and parties over which it can exercise effective control. That since by Administration Order 388 and Final Judgment of January 23, 1948, the Long Beach Association has been restored to its shareholders and their elected officers, the Administration refrain from taking any action regarding the Long Beach Association until after notice and opportunity to apply for judicial review.

2. The United States District Court retain general jurisdiction of the litigation but refrain from acting upon matters within the orbit of action of an administrative hearing, except as such matters may be brought up for review under the Administrative Procedure Act, or otherwise.

Wherefore, it is respectfully requested that:

1. This petition for rehearing be granted, or

2. If denied, the cause be remanded with directions that the case be held pending the conclusion of administrative hearings, but that the issuance of the mandate be stayed pending preparation and presentation to the Supreme Court of petitions for certiorari, and,

3. If administrative hearings are held, they be limited to matters, properties, and parties over which it can exercise effective control.

Dated April 30, 1952.

Respectfully submitted,

WESTOVER & SMITH,

By WYCKOFF WESTOVER,

Attorneys for the Appellees, The Shareholders (as a class) of the Long Beach Federal Savings and Loan Association.

Certificate of Counsel.

Wyckoff Westover certifies that he is a member of the firm of Westover & Smith, attorneys for the appellees Mallonee *et al.,* The Shareholders' Protective Committee; that he makes this Certificate in compliance with Rule 25 of the Rules of this United States Court of Appeals for the Ninth Circuit; that in his judgment, the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

WYCKOFF WESTOVER.